

GRAY MAIL

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96TH CONGRESS
2D SESSION

S. 1482

[Report No. 96-823]

To provide certain pretrial, trial, and appellate procedures for criminal cases involving classified information.

IN THE SENATE OF THE UNITED STATES

July 11 (legislative day, June 21), 1979

Mr. BIDEN (for himself, Mr. BAYH, Mr. HUDDLESTON, and Mr. KENNEDY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

JUNE 18 (legislative day, JUNE 12), 1980

Reported by Mr. BIDEN, without amendments

[Omit the part struck through and insert the part in italic]

A BILL

To provide certain pretrial, trial, and appellate procedures for criminal cases involving classified information.

- 1 *Be it enacted by the Senate and House of Representa-*
- 2 *tives of the United States of America in Congress assembled,*
- 3 That this Act may be cited as the "Classified Information
- 4 Procedures Act".

1 DEFINITIONS

2 SECTION 1. (a) "Classified information", as used in this
3 Act, means any information or material that has been deter-
4 mined by the United States Government pursuant to an Ex-
5 ecutive order, statute, or regulation, to require protection
6 against unauthorized disclosure for reasons of national secu-
7 rity and any restricted data, as defined in section 2014(y) of
8 title 42, United States Code.

9 (b) "National security", as used in this Act, means the
10 national defense and foreign relations of the United States.

11 PRETRIAL CONFERENCE

12 SEC. 2. At any time after the filing of the indictment or
13 information, any party may move for a pretrial conference to
14 consider matters relating to classified information that may
15 arise in connection with the prosecution. Following such
16 motion, or on its own motion, the court shall promptly hold a
17 pretrial conference to establish the timing of requests for dis-
18 covery, the provision of notice required by section 5 of this
19 Act, and the initiation of the procedure established by section
20 6 of this Act. In addition, at the pretrial conference the court
21 may consider any other matters which relate to classified in-
22 formation or which may promote a fair and expeditious trial.

23 PROTECTIVE ORDERS

24 SEC. 3. Upon request of the Government, the court
25 shall issue a protective order to guard against the compro-

1 ~~mise of any classified material disclosed to the defendant in~~
2 *connection with a prosecution by the United States of any*
3 *classified material.*

4 DISCLOSURE OF CLASSIFIED INFORMATION TO
5 DEFENDANTS

6 SEC. 4. The court may authorize the Government to
7 delete specified items of classified information from docu-
8 ments to be made available to the defendant, to substitute a
9 summary of the information for such classified documents, or
10 to substitute a statement admitting relevant facts that the
11 classified information would tend to prove. The Govern-
12 ment's motion requesting such authorization and materials
13 submitted in support thereof shall, upon request of the Gov-
14 ernment, be considered by the court in camera and not dis-
15 closed to the defendant.

16 NOTICE OF DEFENDANT'S INTENTION TO DISCLOSE
17 CLASSIFIED INFORMATION

18 SEC. 5. (a) Notice by Defendant.—If a defendant rea-
19 sonably expects to disclose or to cause the disclosure of clas-
20 sified information in any manner in connection with any trial
21 or pretrial proceeding involving the criminal prosecution of
22 such defendant, the defendant shall, within the time specified
23 by the court or where no time is specified within thirty days
24 prior to trial, notify the attorney for the Government and the
25 court in writing. Whenever a defendant learns of additional

1 classified information he reasonably expects to disclose at any
2 such proceeding, he shall notify the attorney for the Govern-
3 ment and the court in writing as soon as possible thereafter.
4 Such notice shall include a brief description of the classified
5 information. No defendant shall disclose any information
6 known or believed to be classified in connection with a trial
7 or pretrial proceeding until notice has been given under this
8 subsection ~~and~~ until the Government has been afforded a rea-
9 sonable opportunity to seek a determination pursuant to the
10 procedure set forth in section 6 of this Act, *and until the time*
11 *for the Government to appeal such determination under sec-*
12 *tion 7 has expired or any appeal under section 7 by the Gov-*
13 *ernment is decided.*

14 (b) FAILURE TO COMPLY.—If the defendant fails to
15 comply with the requirements of subsection (a) the court may
16 preclude disclosure of any classified information not made the
17 subject of notification and may prohibit the examination by
18 the defendant of any witness with respect to any such
19 information.

20 PROCEDURE FOR CASES INVOLVING CLASSIFIED
21 INFORMATION

22 SEC. 6. (a) MOTION FOR HEARING.—After the United
23 States receives notification pursuant to section 5 or otherwise
24 learns of any classified information that the defendant may
25 disclose or cause to be disclosed at a trial or pretrial proceed-

1 ing, the Government may, within the time specified by the
2 court, move for a hearing concerning any such information.
3 In connection with its motion, the Government may submit
4 the classified information along with an explanation of the
5 basis for the classification to the court for its examination in
6 camera and shall provide the court with an affidavit of the
7 Attorney General, the Deputy Attorney General, or a desig-
8 nated Assistant Attorney General certifying that the informa-
9 tion is classified. The hearing, or specified portion thereof,
10 shall be held in camera whenever the Government certifies
11 that a public proceeding may result in the compromise of
12 classified information.

13 (b) HEARING.—(1) Prior to the hearing, the Govern-
14 ment shall provide the defendant with notice of the informa-
15 tion that will be at issue. This notice shall identify the
16 specific classified information that will be at issue whenever
17 that information has previously been made available to the
18 defendant in connection with the pretrial proceedings. The
19 Government may describe the information by generic category
20 *approved by the Court* rather than identifying the specific
21 information of concern to the Government when the Govern-
22 ment has not previously made the information available to
23 the defendant in connection with the pretrial proceedings.

24 (2) ~~Where the Government moves for a hearing prior to~~
25 ~~trial, the Government shall upon request of the defendant~~

1 provide the defendant with a bill of particulars as to the por-
2 tions of the indictment or information which the defendant
3 identifies as related to the classified information at issue in
4 the hearing. The bill of particulars shall be provided prior to
5 the hearing.

6 (2) Following a hearing, the court shall determine
7 whether and the manner in which the information at issue
8 may be used in a trial or pretrial proceeding. As to each item
9 of classified information, the court shall set forth in writing
10 the basis for its determination. Where the Government's
11 motion under subsection (a) is filed prior to the trial or pre-
12 trial proceeding, the court shall rule prior to the commence-
13 ment of the relevant proceeding.

14 (4)(A) If the court determines that the information may
15 not be disclosed or elicited at a pretrial or trial proceeding
16 the record of the hearing shall be sealed and preserved by the
17 Government in the event of an appeal. The defendant may
18 seek reconsideration of the court's determination prior to or
19 during trial.

20 (B) In lieu of authorizing disclosure of the specific clas-
21 sified information, the court shall, if it finds that the defend-
22 ant's right to a fair trial will not be prejudiced, order—

23 (i) substitution of a statement admitting relevant
24 facts that the specific classified information would tend
25 to prove, or

1 (ii) substitution of a summary or portion of a spe-
2 cific classified information.

3 (C) If the court determines that these alternatives to full
4 disclosure may not be used and the Government provides the
5 court with an affidavit of the Attorney General, Deputy At-
6 torney General, or designated Assistant Attorney General
7 objecting to disclosure of the information, the court shall
8 issue any order which is required in the interest of justice.
9 Such an order may include, but need not be limited to an
10 order—

11 (i) striking or precluding all or part of the testi-
12 mony of a witness; or

13 (ii) declaring a mistrial; or

14 (iii) finding against the Government on any issue
15 as to which the evidence relates; or

16 (iv) dismissing the action, with or without preju-
17 dice; or

18 (v) dismissing specified counts of the indictment
19 against the defendant.

20 Any such order shall permit the Government to avoid the
21 sanction for nondisclosure by agreeing to permit the defend-
22 ant to disclose the information at the pertinent trial or pre-
23 trial proceeding. The Government may exercise its right to
24 take an interlocutory appeal prior to determining whether to
25 permit disclosure of any classified information.

1 (c) RECIPROCITY.—Whenever the court determines
2 pursuant to subsection (b) that classified information may be
3 disclosed in connection with a trial or pretrial proceeding, the
4 court shall, unless the interest of fairness does not so require,
5 order the Government to provide the defendant with the in-
6 formation it expects to use to rebut the classified information.
7 The court may place the Government under a continuing
8 duty to disclose such rebuttal information. If the Government
9 fails to comply with its obligation under this subsection, the
10 court may exclude any evidence not made the subject of a
11 required disclosure and may prohibit the examination by the
12 Government of any witness with respect to such information.

13

INTERLOCUTORY APPEAL

14 SEC. 7. (a) An interlocutory appeal by the United States
15 taken before or after the defendant has been placed in jeop-
16 ardy shall lie to a court of appeals from a decision or order of
17 a district court in a criminal case requiring the disclosure of
18 classified information, imposing sanctions for nondisclosure of
19 classified information, or refusing a protective order sought
20 by the United States to prevent the disclosure of classified
21 information, if the Attorney General, Deputy Attorney Gen-
22 eral, or designated Assistant Attorney General certifies to
23 the district court that the appeal is not taken for purposes of
24 delay information.

1 (b) An appeal taken pursuant to this section either
2 before or during trial shall be expedited by the court of ap-
3 peals. Prior to trial, an appeal shall be taken within ten days
4 after the decision or order appealed from and the trial shall
5 not commence until the appeal is resolved. If an appeal is
6 taken during trial, the trial court shall adjourn the trial until
7 the appeal is resolved and the court of appeals (i) shall hear
8 argument on such appeal within four days of the adjournment
9 of the trial, (ii) may dispense with written briefs other than
10 the supporting materials previously submitted to the trial
11 court, (iii) shall render its decision within four days of argu-
12 ment on appeal, and (iv) may dispense with the issuance of a
13 written opinion in rendering its decision. Such appeal and
14 decision shall not affect the right of the defendant, in a subse-
15 quent appeal from a judgment of conviction, to claim as error
16 reversal by the trial court on remand of a ruling appealed
17 from during trial.

18 INTRODUCTION OF CLASSIFIED INFORMATION

19 SEC. 8. (a) CLASSIFICATION STATUS.—Writings, re-
20 cordings, and photographs containing classified information
21 may be admitted into evidence without change in their classi-
22 fication status.

23 (b) PRECAUTIONS BY COURT.—The court, in order to
24 prevent unnecessary disclosure of classified information in-
25 volved in any criminal proceeding, may order admission into

1 evidence of only part of a writing, recording, or photograph,
2 or may order admission into evidence of the whole writing,
3 recording, or photograph with excision of some or all of the
4 classified information contained therein.

5 (c) TAKING OF TESTIMONY.—During the examination
6 of a witness in any criminal proceeding, the Government may
7 object to any question or line of inquiry that may require the
8 witness to disclose classified information not previously found
9 to be admissible. Following such an objection, the court shall
10 take such suitable action to determine whether the response
11 is admissible as will safeguard against the compromise of any
12 classified information. Such action may include requiring the
13 Government to provide the court with a proffer of the wit-
14 ness' response to the question or line of inquiry and requiring
15 the defendant to provide the court with a proffer of the
16 nature of the information he seeks to elicit.

17 SECURITY PROCEDURES TO SAFEGUARD AGAINST COM-
18 PROMISE OF CLASSIFIED INFORMATION DISCLOSED
19 TO THE COURT

20 SEC. 9. (a) Within one hundred and twenty days follow-
21 ing the date of enactment of this Act, the Chief Justice of the
22 United States, in consultation with the Attorney General, the
23 Director of Central Intelligence, and the Secretary of De-
24 fense, shall prescribe security procedures for protection
25 against the compromise of classified information submitted to

1 the Federal district courts, the courts of appeals, and the
2 Supreme Court.

3 (b) Until such time as procedures are promulgated pur-
4 suant to subsection (a), the Federal courts shall in each case
5 involving classified information adopt procedures to protect
6 against the compromise of such information.

7 ~~JENCKS ACT EXCEPTION FOR CLASSIFIED INFORMATION~~

8 ~~SEC. 10. (a) Chapter 223 of title 18, United States~~
9 ~~Code, is amended by adding after subsection 3500(e) the fol-~~
10 ~~lowing new subsection:~~

11 ~~“(d) If the United States claims that any statement oth-~~
12 ~~erwise producible under this section contains classified infor-~~
13 ~~mation, the United States may deliver such statement for the~~
14 ~~inspection of the court in camera and provide the court with~~
15 ~~an affidavit from the Attorney General, Deputy Attorney~~
16 ~~General, or designated Assistant Attorney General identify-~~
17 ~~ing the portions of the statement that are classified. If the~~
18 ~~court finds that any such portion of the statement is consist-~~
19 ~~ent with the witness' testimony, the court may substitute a~~
20 ~~summary for the classified portion or excise the portion from~~
21 ~~the statement. With such material replaced by a substitution~~
22 ~~or excised, the court shall then direct delivery of such state-~~
23 ~~ment to the defendant for his use. If, pursuant to such proce-~~
24 ~~dure, any portion of such statement is withheld from the de-~~
25 ~~fendant and the defendant objects to such withholding, and~~

1 the trial is continued to an adjudication of the guilt of the
2 defendant, the entire text of such statement as well as the
3 affidavit submitted by the United States shall be preserved by
4 the United States and, in the event the defendant appeals,
5 shall be made available to the court of appeals for its exami-
6 nation for the purpose of determining the correctness of the
7 ruling of the trial judge. Whenever any statement is delivered
8 to a defendant pursuant to this section, the court in its discre-
9 tion, upon application of said defendant, may recess proceed-
10 ings in the trial for such time as it may determine to be
11 reasonably required for the examination of such statement by
12 said defendant and his preparation for its use in the trial.”.

13 (b) Chapter 223 of title 18, United States Code, is
14 amended as follows:

15 (1) Present subsections 3500(d) and 3500(e) shall
16 be redesignated subsections 3500(e) and 3500(f), re-
17 spectively.

18 (2) In new subsection 3500(e), following the word
19 “under” replace “subsection (b) or (e)” with “subsec-
20 tion (b), (e), or (d).”.

21 (3) In new subsection 3500(f), following the words
22 “used in” replace “subsection (b), (e), and (d)” with
23 “subsection (b), (e), (d), and (e).”.

1 IDENTIFICATION OF INFORMATION RELATED TO THE
2 NATIONAL DEFENSE

3 SEC. ~~11~~. 10. In any prosecution in which the Govern-
4 ment must establish that material relates to the national de-
5 fense or constitutes classified information, the Government
6 shall notify the defendant, within the time specified by the
7 court, of the portions of the material that it reasonably ex-
8 pects to rely upon to establish the national defense or classi-
9 fied information element of the offense.

10 SEC. 11. *Sections 1 through 10 of this Act may be*
11 *amended as provided in section 2076, title 28, United States*
12 *Code.*

13 ATTORNEY GENERAL GUIDELINES

14 SEC. 12. (a) Within one hundred and eighty days of en-
15 actment of this law, the Attorney General shall issue guide-
16 lines specifying the factors to be used by the Department of
17 Justice in rendering a decision whether to prosecute a viola-
18 tion of Federal law in which, in the judgment of the Attorney
19 General, there is a possibility that classified information will
20 be revealed. Such guidelines shall be transmitted to the ap-
21 propriate committees of Congress.

22 (b) When the Department of Justice decides not to pros-
23 ecute a violation of Federal law pursuant to subsection (a), an
24 appropriate official of the Department of Justice shall pre-

1 pare written findings detailing the reasons for the decision
2 not to prosecute. The findings shall include—

3 (1) the intelligence information which the Depart-
4 ment of Justice officials believe might be disclosed,

5 (2) the purpose for which the information might
6 be disclosed,

7 (3) the probability that the information would be
8 disclosed, and

9 (4) the possible consequences such disclosure
10 would have on the national security.

11 (c) Consistent with applicable authorities and duties, in-
12 cluding those conferred by the Constitution upon the execu-
13 tive and legislative branches, the Attorney General *or his*
14 *designee* shall ~~make available~~ *report orally or in writing*
15 *semiannually* to the Permanent Select Committee on Intelli-
16 gence of the United States House of Representatives and the
17 Select Committee on Intelligence of the United States
18 Senate ~~all findings under subsection (b) not later than thirty~~
19 ~~days after the decision not to prosecute is made.~~ *on all cases*
20 *where a decision not to prosecute a violation of Federal law*
21 *pursuant to subsection (a) has been made.*

22 *REPORTS TO CONGRESS*

23 *SEC. 13. The Attorney General shall deliver to appro-*
24 *priate committees of Congress a report concerning the oper-*
25 *ation and effectiveness of this Act and including suggested*

15

- 1 *amendments to this Act. For the first three years this Act is*
- 2 *in effect, there shall be a report each year. After three years,*
- 3 *such reports shall be delivered as necessary.*

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[Report No. 96-823]

A BILL

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Read twice and referred to the Committee on the Judiciary

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